UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
The Clorox Company,	)	**Docket No. FIFRA-09-2007-0007**
	)	
	)	
Respondent.	)	

ORDER GRANTING MOTIONS FOR EXTENSION OF TIME AND TO STRIKE, AND DENYING MOTIONS FOR DEFAULT AND TO VACATE ORDER

I. Background and Arguments of the Parties

On April 6, 2007, The United States Environmental Protection Agency, Region 9, ("Complainant" or "EPA"), initiated this action against The Clorox Company ("Respondent"), for violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), arising from the alleged distribution of unregistered and misbranded pesticides to community and non-profit organizations in Los Angeles, California. After unsuccessful attempts at settlement through alternative dispute resolution, a Prehearing Order was issued establishing, *inter alia*, filing deadlines for the parties' Prehearing Exchange. On August 21, 2007, Complainant's unopposed motion for a 15 day extension of time for filing its exchange was granted and the prehearing deadlines were reset to September 18, 2007 for Complainant's Initial Prehearing Exchange, October 9, 2007 for Respondent's Prehearing Exchange, and October 20, 2007 for Complainant's Reply Prehearing Exchange.

Complainant filed its Prehearing Exchange in a timely manner on or about September 18, 2007. However, Respondent did not file its prehearing exchange by the due date. Instead, two days later, on October 11, 2007, Respondent submitted a "Notice of Settlement," stating that the parties had reached a settlement in principle and requesting that the remaining deadlines be vacated pending the filing of the fully executed Consent Agreement and Final Order ("CAFO"), which it anticipated occurring within the next 30 days. On October 15, 2007, Respondent signed the CAFO. On October 16, 2007, Respondent and Complainant received an email from the undersigned's legal assistant stating that the Notice of Settlement was not an acceptable form of pleading for obtaining an extension of time and indicating that Respondent was in default for failing to file its prehearing exchange or an appropriate motion in a timely manner. In response, Respondent promptly submitted a "Stipulated Motion For Extension of Prehearing Exchange Schedule and Related Relief" ("Stipulated Motion"), requesting additional time for senior management to review and approve the CAFO.

By Order dated October 17, 2007, Respondent's Stipulated Motion was granted, providing Respondent until November 15, 2007 to file its prehearing exchange or the fully executed CAFO. The Order explained that Respondent was technically in default due to its late filing and that the Notice of Settlement alone did not cure such default in that the Prehearing Order explicitly stated in bold underlined capital font that a settlement in principle would not constitute a basis for failing to strictly comply with prehearing exchange requirements, and that only an order from the judge or a filed CAFO excuses noncompliance.

On October 19, 2007, Complainant filed a "Motion to Vacate Order Granting Stipulated Motion For Extension of Time, Motion to Strike and Motion For Default Order" ("Motion to Vacate"). In its Motion, pursuant to 40 C.F.R. ¢ 22.16(a), Complainant requests that the October 17th Order on the Stipulated Motion be vacated and that Respondent be held in default based upon Respondent's material misrepresentations and misleading statement in its Stipulated Motion. Complainant asserts that it never stipulated to the actual motion that was filed and was never afforded the opportunity to review the document before Respondent filed it. In addition, Complainant alleges that since Respondent incorrectly represented that the parties stipulated to its Motion, Complainant was denied the opportunity to file a response to the Motion pursuant to 40 C.F.R ¢ 22.16(b), which Complainant claims it would have done if the Order granting Respondent's Stipulated Motion has not been issued so quickly. Complainant also seeks to strike Exhibit B from Respondent's Stipulated Motion, which is a copy of the partially executed CAFO. Complainant asserts, pursuant to 40 C.F.R. ¢ 22.22(a), that the CAFO is still subject to revision or withdrawal and includes proposed compromised claims and terms of settlement, and was thus brought improperly before the presiding judge. Furthermore, Complainant moves for default pursuant to 40 C.F.R. ¢ 22.17(c) on the grounds that the undersigned has already found that Respondent was in default for not meeting the deadline for filing its prehearing exchange.

On November 2, 2007, Respondent filed an "Opposition to the Motion to Vacate and a Motion For Entry of Default Against EPA and Modification of Prehearing Order" ("Opposition") raising several issues. First, Respondent argues that EPA's Motion to Vacate does not comply with the Prehearing Order's requirement that parties contact each other prior to filing any motion to see if there are objections to the relief being sought in order to expedite rulings. Respondent asserts that Complainant did not contact Respondent before filing its Motion. Second, Respondent argues that Complainant was required, but failed, to seek or meet the requirement for reconsideration, given that the October 17th Order had been issued granting the extension of time. Third, Respondent asserts that Complainant knew that the case had been settled and that time was needed to finalize the CAFO and also knew that its Prehearing Exchange was not received by Respondent until September 25, 2007. Respondent emphasizes that it conferred with Complainant as required by the Prehearing Order prior to filing the Stipulated Motion and that Complainant incurred no prejudice as a result of granting the extension of time as it was intended to primarily benefit Complainant by allowing it time to execute the settlement agreement.

Additionally, in its Opposition, Respondent argues that Complainant's motions in this case breached its stipulation and the settlement agreement as Complainant unequivocally agreed

to a stipulated request for relief and a 30-day extension of prehearing exchange deadlines. Respondent argues that a settlement agreement is a contract and courts have inherent power to summarily enforce a settlement agreement and favor dispute resolution through voluntary settlement, citing *Core-Vent Corp. v. Implant Innovations, Inc*., 53 F.3d 1252, 1258-59 (Fed. Cir.1995). Respondent further argues that by seeking a default order, Complainant injures the right of Respondent to receive the benefits of the settlement. Respondent asserts that having received Respondent's signature on the CAFO, Complainant is now attempting to use delay and equivocation in an attempt to avoid its contractual obligations in favor of a better result. In support of this assertion, Respondent presents copies of e-mail messages between counsel for the parties.

Moreover, Respondent raises the argument in its Opposition that Complainant defaulted on *its* Prehearing Exchange deadline. Respondent claims that Complainant served its prehearing exchange on it only after Respondent contacted Complainant to notify that it had not yet received the prehearing exchange. In support, Respondent presents a copy of the Complainant's envelope showing a postmark of September 21, 2007, three days after the filing deadline. Respondent asserts that Complainant had repeated opportunities to mitigate the prejudice caused by its late service. Lastly, Respondent posits that when it originally requested a new deadline for filing its prehearing exchange, it was based upon Complainant's representations that the Agency would promptly counter-execute the CAFO. Respondent alleges that Complainant is unfairly attempting to force Respondent to unnecessarily expend time and effort preparing to litigate this case only to have Complainant sign the Consent Agreement.

Based upon the foregoing, Respondent's Opposition requests that a *default be entered against Complainant*, or that a deadline for Complainant to sign and file the CAFO be set and that Respondent be granted thirty days after that deadline to file its prehearing exchange.

On November 8, 2007, Complainant filed a "Response to Motion In The Alternative For Entry of Default Against EPA and Modification of Prehearing Order;" and a "Reply in Support of Motion to Vacate" (collectively, "Reply"). Complainant asserts that it was not in default in regard to filing its Prehearing Exchange in that the file stamp shows that it was filed with the Regional Hearing Clerk on September 18, 2007, the deadline date. Furthermore, Complainant points out that its certificate of service on the Prehearing Exchange is also dated September 18th, and refers to 40 C.F.R. ' 22.7(c): "Except for the complaint, service of all other documents is complete upon mailing." Complainant does not agree that any extension of time should be granted, stating that Respondent has provided no compelling reason to modify the prehearing exchange schedule. Complainant asserts that all of Respondent's arguments, declarations and exhibits relating to the draft CAFO and the parties' settlement discussions contained in Respondent's Opposition and Motion are not properly before the Presiding Judge because the Rules provide that "evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence is not admissible." Therefore, Complainant states these arguments, declarations and exhibits should be stricken from Respondent's Opposition.

II. Discussion and Conclusions

A. Motions for Default

The Rules provide at 40 C.F.R. c 22.17(a) that "[a] party may be found to be in default . . . upon failure to comply with . . . an order of the Presiding Officer . . . Default by respondent constitutes, for the purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." The Rules further provide that "[w]hen the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party, as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued" (40 C.F.R. c 22.17(c)).

Default is harsh and disfavored sanction, reserved only for the most egregious behavior. "A default judgment is appropriate where the party against whom the judgment is sought has engaged in 'willful violations of court rules, contumacious conduct, or intentional delays.'" *Forsythe v. Hales*, 255 F. 3d 487. 490 (8th Cir. 2001) (*quoting Fingerhut Corp. v. Ackra Direct Mktg. Corp.*, 86 F.3d 852, 856 (8th Cir. 1996). "[D]efault judgment is not an appropriate sanction for a "marginal failure to comply with the time requirements [and] . . . should be distinguished from dismissals or other sanctions imposed for willful violations of court rules, contumacious conduct, or intentional delays." *Time Equipment Rental & Sales, Inc. v. Harre*, 983 F. 2d 128, 130 (8th Cir. 1993)(12 day delay in filing answer did not warrant entry of default). Moreover, Administrative Law Judges have broad discretion in ruling upon motions for default. Issuance of such an order is not a matter of right, even where a party is technically in default. *See*, *Lewis v. Lynn*, 236 F. 3d 766 (5th Cir. 2001). This broad discretion is informed by "the type and the extent of any violations and by the degree of actual prejudice to the Complainant." *Lyon County Landfill,* EPA Docket No. 5- CAA-96-011, 1997 EPA ALJ LEXIS 193 * 14 (ALJ, Sept. 11, 1997).

Respondent *is* technically in default for its failure to meet the October 9, 2007 filing deadline for its Prehearing Exchange or a motion requesting an extension of the deadline. However, Complainant has not alleged that it has or will suffer any prejudice from Respondent filing for the necessary extension a week late (on October 16, 2007). Further, such delay is a "marginal failure" to comply with a time requirement in that the record shows that the parties had already reached a settlement in principle, Respondent had filed, albeit two days late, a Notice of Settlement, and had already signed the proposed CAFO. Moreover, this Tribunal is charged by the Rules with the responsibility not only to "avoid delay," but also to "conduct a fair and impartial proceeding . . . ." 40 C.F.R. c 22.4(c). Therefore, entry of a default order against Respondent at this time is not appropriate.

As to Respondent's request to hold Complainant in default, the postmark on the

envelope is not dispositive of the date that its Prehearing Exchange was "mailed." The Rules of Practice provide that "[s]ervice of . . . documents is complete upon mailing or when placed in the custody of a reliable commercial delivery service." 40 C.F.R. § 22.7(c). "Mailing" means placement in the appropriate mailbox, and in the case of the Agency, apparently placement of postage on the item occurs after it is placed in the mailbox. Thus, while unfortunately in this case it appears that the postage was not placed on the item until three days after the date is was required to be served, such delay alone does not warrant the drastic remedy of default in that Respondent has not suffered any prejudice from the delay in receipt of Complainant's Prehearing Exchange in that it was granted an extension of time until November 15th to file its prehearing exchange.

Accordingly, Complainant's Motion for Default Order against Respondent and Respondent's Motion for Default Order against Complainant are both denied.

B. Motion to Vacate Order and Motion for Modification of Prehearing Order

Where a settlement in principle has been reached, providing a reasonable extension of the existing filing deadlines so as to give the parties the opportunity to focus their resources on expeditiously finalizing and filing their CAFO rather than preparing for hearing is beneficial to the parties and promotes judicial economy. However, the fact that the parties in this case, after apparently reaching a settlement in principle, spent substantial resources -- thus demanding expenditure of substantial judicial resources -- in filing several extensive motions questioning the practices of the other and seeking sanctions therefor, weighs against the idea that the settlement will actually come to fruition and this Tribunal's willingness to grant them any more time to execute and file the CAFO in lieu of moving toward hearing. On the other hand, the Regional Hearing Clerk has reported that Respondent has filed its Prehearing Exchange, and so, in the interim, one step further along the hearing process has been taken, and Respondent's request for additional time to file its Prehearing Exchange has become moot.

In the circumstances of this case, to spend additional resources on what is essentially a quibble between the parties as to the extent to which Complainant's counsel agreed to the relief requested or stipulated to representations in Respondent's Stipulated Motion is simply a waste of time. The Prehearing Order (at 6) requires the movant to contact the other party to determine whether it has any objection to the granting of the relief sought in the motion, and to state the position of the other party. Respondent did not simply do what was required, that is, to state that Complainant did not object to the relief sought. Respondent went further and stated that the parties "stipulate to this motion and the relief sought." Stipulated Motion at 2. As lawyers often have to learn, overdoing something in litigation often leads to problems. This is such a case, where counsel for both parties have overdone motions practice, even after they have agreed to a settlement of the case. No further discussion of the matter is

warranted. The Complainant's request to vacate the Order on the Stipulated Motion is denied.

C. Complainant's Motion to Strike Partially Signed Consent Agreement and Final Order

In accordance with 40 C.F.R. ç 22.22(a)(1), which is analogous to Federal Rules of Evidence Rule 408, "evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible." Rule 408 generally provides that, when offered to prove liability, or lack thereof, of an amount claimed in a dispute, evidence of offers to compromise a claim or conduct or statements made in compromise negotiations regarding the claim, is inadmissible. The undersigned strongly believes that not only should such evidence not be offered at hearing, but that evidence relating to the terms of an incomplete settlement, such as settlement offers, tentatively agreed upon settlement terms, or draft, proposed, or partially executed settlement agreements, as well as statements made by the parties in negotiations related thereto, should *never* be presented to the Judge presiding over the matter for hearing. Until a fully executed CAFO is filed, there is always the possibility that the Judge may have to rule on liability and/or penalty and, if such settlement terms are in the record, it could create the appearance of bias. Therefore, draft CAFOs and correspondence between the parties which relate to settlement offers or settlement terms are inappropriate to file in a proceeding. The question of whether or not the exhibits attached to the Opposition include terms or offers of settlement is not necessary to decide here, as the exhibits were not material to the outcome of the motions and were not considered in ruling thereon. Nevertheless, as a measure of caution, they are hereby stricken. Accordingly, Complainant's motion to strike Respondent's Exhibit B to its Stipulated Motion, and to strike the exhibits attached to its Opposition is granted.

ORDER

1. Complainant's Motion to Vacate Order Granting Stipulated Motion for Extension of Time is **DENIED.**

2. Complainant's Motion to Strike is **GRANTED.**

3. Complainant's Motion for Default Order is **DENIED.**

4. Respondent's Motion for Entry of Default Against EPA is **DENIED.**

5. Respondent's Motion for Modification of Prehearing Order is **GRANTED** to the extent that it requests additional time for the parties to file their fully executed CAFO. The Motion for extension of time to file the prehearing exchange is **DENIED** as moot. The parties shall have until **December 15, 2007** to file a fully their executed CAFO in this matter.

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Susan L. Biro
Chief Administrative Law Judge

Dated: November 20, 2007
Washington, D.C.